SUPREME COURT, U.S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-831

JOSEPH GIORDANO, SAM GIORDANO and
JOSEPHINE GIORDANO,
Appellants,

v.

H. F. STUBBS, BOB E. L. HOPE, SUMMER-MINTER AND
ASSOCIATES, INC., and HUGH SUMMER,
Appellees.

On Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

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Appellees.

On Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

Appellants Joseph P. Giordano, Sam Giordano and Josephine Giordano, have filed a Notice of Appeal to review the judgments (in companion cases) of the Supreme Court of Georgia entered on September 27, 1971.

OPINIONS BELOW

The Opinions of the Supreme Court of Georgia, reported at 228 Ga. 75 and 228 Ga. 85 are set out in Appendix A hereto. The Order of the Superior Court of DeKalb County, unreported, is set out in Appendix B hereto.

GROUNDS OF JURISDICTION

This was an action instituted in the Superior Court of DeKalb County, Georgia for the purpose of setting aside a certain real estate foreclosure. The action was commenced in accordance with the Georgia Civil Practice Act and invoked the general equitable powers of the Court. Plaintiffs, holders of a second security deed to certain described real estate sought relief against the foreclosure, without notice, of a first security deed to the property. Under Georgia law, the effect of the foreclosure of a senior security interest in property is to destroy junior interests in the property. **Scott** [illegible]**isley**, 271 U.S. 636 (1925); see also the decision of the Court below, 228 Ga. 75.

Plaintiffs sought a declaration of the invalidity of the foreclosure on several state grounds and upon the federal ground that the foreclosure, if held vaid, in the circumstances of the case, would deprive them of their property without due process of law.

Both parties filed motions for summary judgment. These were denied by the Superior Court of DeKalb County on March 8, 1971. The Superior Court granted a certificate allowing an interlocutory appeal. See Appendix B.

The Supreme Court of Georgia filed its judgment and opinion on September 27, 1971 affirming the denial of plaintiffs' motion for summary judgment but reversing the denial of the motion for summary judgment filed on behalf of the defendants. The notice of appeal to this Court was filed in the Supreme Court of Georgia on December 22, 1971.

The complaint and this appeal call in question the validity of Georgia Laws 1935, page 381 (codified at Georgia Code Ann., § 37-611 and § 67-1506) which provides as follows:

"No sale of real estate under powers contained in mortgages, debt, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of Sheriff's sales in the county in which such real estate, or a part thereof, is located."

This Statute has been authoritatively construed by the Georgia courts as authorizing foreclosure with notice by publication to persons interested in the property, but without actual notice. See the opinion of the Court below at 228 Ga. 78, and cases cited. Plaintiffs contended in the courts below that a foreclosure without notice pursuant to such statute as so construed would deprive them of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, and that the Statute as so construed was unconstitutional. This constitutional claim was rejected. Jurisdiction is conferred upon this Court by Title 28 U.S.C., § 1257 (2).

Jurisdiction of this Court is properly invoked by appeal. The case presents essentially the same questions that were presented to this court by appeal in **Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 94 L.ed 875 (1950). In that case, as in this, the question presented to the court for review was whether a state statute which authorized the destruction of valuable property rights with notice to affected parties by publication only could withstand a challenge based upon the Fourteenth Amendment to the United States Constitution. In addition, this court reviewed by writ of error **Miller v. Schoene**, 276 U.S. 272, 72 L.ed 568 (1928). That case dealt with the constitutionality under the Fourteenth Amendment of a State Statute authorizing the destruction of trees where considered to be necessary to prevent the spread of a certain disease. **Winters v. New York**, 333 U.S. 507, 92 L.ed 840 (1948), was a review by appeal of a challenge to a state obscenity statute under the Fourteenth Amendment to the United States Constitution.

QUESTIONS PRESENTED

1. Does a State Statute which authorizes the destruction of subordinate security interests in property by foreclosure of senior security interests without notice (other than by publication) violate the due process clause of the Fourteenth Amendment to the United States Constitution where the foreclosing party has actual knowledge of the existence of the subordinate security interests and of the names and addresses of the holders of such interests.

2. Where the holder of a first security interest in property has actual knowledge of the existence of a subordinate security interest in such property and of the names and addresses of the holders of such subordinate security interests and, despite such knowledge, forecloses without notice to the holders of the subordinate interest (other than by publication), and where the effect of such foreclosure under state law is to destroy the subordinate interest, does the state statute authorizing such procedure, as applied, deprive the holders of the subordinate security interest of their property without due process of law?

STATEMENT OF THE CASE

This case involves certain real estate in Gwinnett County, Georgia, with a value of approximately $200,000.00. Immediately prior to February 3, 1970, Bob E. L. Pope was the owner of such property subject to two security deeds. The first security deed was held by the defendant Stubbs to secure an indebtedness of $30,000.00 and the second security deed was held by the plaintiffs to secure an indebtedness of $163,500.00. Though the plaintiffs were unaware of it, Pope defaulted on his note to Stubbs on October 14, 1969, and in January of 1970 Stubbs commenced foreclosure proceedings.

Stubbs had actual knowledge of the existence of plaintiffs' security interest in the property, and actual knowledge of the names and addresses of the plaintiffs. In spite of such knowledge, Stubbs did not give notice to the plaintiffs of the foreclosure proceeding, although he did publish notice of the foreclosure in the Gwinnett Daily News as required by Georgia law. (Plaintiffs Joseph and Sam Giordano were residents of DeKalb County, Georgia, and plaintiff Josephine Giordano was a resident of Batavia, New York.)

Plaintiffs did not learn of the foreclosure until after it had taken place. As a result, the only person bidding at the foreclosure was an agent for the defendant Stubbs who bid in the property for Stubbs for $35,000.00, which amount was entirely consumed in paying the Stubbs indebtedness and costs of the foreclosure. Pope is insolvent and has subsequently defaulted on the note given to the plaintiffs.

Under Georgia law the effect of a foreclosure of a senior security instrument is to destroy all subordinate interests in the property. If the foreclosure is held to be valid, plaintiffs will have lost their security and any chance of realizing on the indebtedness to them.

Plaintiffs contended that if the Georgia foreclosure procedure, particularly Georgia Laws 1935, page 381, set out above, is sustained in these circumstances, the effect of such holding would be to deprive the plaintiffs of their property without due process of law. The Supreme Court of Georgia sustained a motion for summary judgment on behalf of the defendants and therefore, in effect, denied the plaintiffs' constitutional contentions.

Plaintiffs' constitutional contentions were presented to the Superior Court of DeKalb County in the Amended Complaint and by brief in opposition to the defendants' motion for summary judgment. When the Superior Court

of DeKalb County denied the motions for summary judgment made on behalf of all parties, it, apparently, found it unnecessary to rule upon the constitutional claim. Thereafter, the plaintiffs filed a notice of appeal to the Georgia Court of Appeals (which does not have jurisdiction over the constitutional claim) but the defendants filed notice of appeal to the Georgia Supreme Court. The cases in the Court of Appeals were transferred on the motion of the Court to the Georgia Supreme Court. Although the plaintiffs believed that the constitutional issue should not be decided by the Supreme Court of Georgia since it had not been decided by the trial court, the plaintiffs briefed the question in the Supreme Court of Georgia, as did the defendants. Briefly stated, the Plaintiffs relied upon **Mullane v. The Hanover Bank & Trust Co.**, 339 U.S. 306, 94 L.ed. 875 (1950), and cases following it, for the proposition that they were entitled as a matter of constitutional law to receive notice of the foreclosure in the circumstances of this case. Defendants relied, for the contrary proposition, principally upon **Scott v. Paisley**, 271 U.S. 636 (1925). Although the plaintiffs do not believe that the Supreme Court of Georgia should have passed upon the constitutional question, since it was not passed upon by the trial court, the effect of the decision of the Georgia Supreme Court is to conclude the case and thereby to deny the plaintiffs' constitutional claim. Apparently this was the intention of the Supreme Court of Georgia since it relied, in its opinion, upon **Scott v. Paisley**. See 228 Ga. 75, at 78.

The Federal Questions Are Substantial

The leading case is **Mullane v. Central Hanover Bank & Trust Company**, 339 U.S. 306, 94 L.ed. 875 (1950). In that case, a New York statute allowed a corporate trustee to settle accounts with regard to its administration of a common trust fund by filing a suit for the purpose. The statute provided that the only notice that had to be given to

persons interested in the fund was notice by publication for four successive weeks. The publication contained the name and address of the trust company, the name and date of establishment of the trust fund, and a list of participating estates, trusts or funds.

The Supreme Court held that this statutory procedure was violative of the due process clause of the Fourteenth Amendment. Mr. Justice Jackson, for the Court, noted that valuable property rights could be destroyed and, as a practical matter, without notice. Only chance, the Court said, brings a newspaper advertisement to the attention of all persons interested. The Court took notice of the necessity for establishing a procedure for settling the accounts of a common trust fund, but said that only a procedure that

> "one desirous of actually informing the absentee might reasonably adopt to accomplish it"

would satisfy the requirements of due process. Thus, the trustee was required at least to give notice by mail to those beneficiaries whose addresses were in its files. Insofar as the statute relieved it of this obligation it was unconstitutional.

The **Mullane** case has been cited and followed in a wide variety of circumstances.

Walker v. Hutchinson, 352 U.S. 112, 1 L.ed. 2d 178, 77 S.Ct. 200, was a case in which the City of Hutchinson condemned the petitioner's property, giving notice by publication. The Court, relying upon **Mullane**, held that this was a violation of due process. Mr. Justice Black, for the court, said:

> "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out

many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case, there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value." 352 U.S. at 116.

The state relied upon **Huling v. Kaw Valley R. and Improvement Co.**, 130 U.S. 559. The court pointed out that that was an 1889 case which upheld notice by publication in a condemnation proceeding on the ground that the landowner was a non-resident. Mr. Justice Black then said:

"Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision." 352 U.S. at 116.

In the case at bar two of the plaintiffs were residents of Georgia and the defendant Stubbs was aware of their interest in the property.

Covey v. Somers, 351 U.S. 141, 100 L.ed. 1021, 76 S.Ct. 724 (1956), involved a sale of a taxpayer's property for unpaid taxes. The taxpayer in this case received actual notice of the tax default and the impending sale of the property. However, she was incompetent and known to the city officials to be incapable of handling her property. This Court held that the sale of the property in these circumstances was unconstitutional. Relying upon **Mullane**, the court said:

"When notice is a person's due, process which is a mere gesture is not due process. The means em-

ployed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

New York v. New York, New Haven & Hartford Railroad Co., 344 U.S. 293, 97 L.ed 333, 73 S.Ct. 299 (1953), was a reorganization under the bankruptcy law. The city had a lien on the property of the railroad imposed for street, sewer and other improvements. The city was not given notice of the reorganization proceedings, except that it was published twice in five daily newspapers. This Court held that this was not adequate notice to cut off the city's lien rights. Relying upon **Mullane**, Mr. Justice Black, for a unanimous court, pointed out that notice by publication is a very poor substitute for actual service of process and its justification is difficult at best. He said that when names, interests and addresses of the persons are unknown, plain necessity may cause a resort to publication but unless there is some such necessity, actual notice is required.

Schroeder v. New York, 371 U.S. 208, 9 L.ed 2d 255, 83 S.Ct. 279, 89 A.L.R. 2d 1398 (1962), was a case in which the city of New York instituted proceedings to acquire the right to divert a river from its natural course. The city gave notice of the action pursuant to a statute which provided that notice would be published in two public newspapers in the city of New York and two public newspapers published in each other county in which any real estate affected was located. In addition, the city posted 22 notices along a few miles of riverbank, but did not give any other notice to property owners.

The statute provided that property owners affected could collect damages for the diversion and imposed a three year statute of limitations. After the expiration of the statute of limitations, the plaintiff filed a suit in equity contending that the notice was unconstitutional,

relying upon **Mullane**. The New York courts upheld the constitutionality of the act but this Court reversed. Mr. Justice Stewart for the unanimous court pointed out that in **Mullane** it was recognized that it is sometimes impossible to give personal notice and the examples given were missing or unknown persons. He then said:

> "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." 371 U.S. at 212, 213.

Mr. Justice Stewart also referred to **New York v. New York, New Haven and Hartford Railroad Co.**, *supra*, where the court pointed out that:

> "Notice by publication is a poor and sometimes hopeless substitute for actual service of notice"

and that

> "its justification is difficult at best."

In **Sniadach v. Family Finance Corporation**, 395 U.S. 337, 23 L.ed 2d 349, 89 S.Ct. 1820 (1969), this Court held unconstitutional a Wisconsin law which provided for garnishment of wages on a pending suit. Mr. Justice Harlan, concurring, said that the debtor was being deprived of the use of the wages during the period between the garnishment and the conclusion of the main suit. He said that the use of the wages was property, of which a person may not be deprived without due process, and he cited the **Mullane** case in that connection.

Marin v. England, 385 U.S. 99, 17 L.ed 2d 197, 87 S.Ct. 274 (1966), involved a part of the bankruptcy act which provides that title to the property of the bankrupt is vested in the trustee on the date of filing of the petition.

A bank had honored checks after the date of filing of a bankruptcy petition but prior to receiving notice of it. This Court refused to give effect to the statutory provisions, and relied upon **Mullane**.

Mullane has general application to the whole subject of notice requirements to satisfy due process of law. As striking examples, consider the cases below outside the property field.

In **Armstrong v. Manzo**, 380 U.S. 545, 14 L.ed. 2d 62, 85 S.Ct. 1187 (1965), a husband and wife were divorced and custody of the child was awarded to the mother. Subsequently the wife married and she and her second husband brought an action for the child to be adopted by the second husband. Texas law provided that the adoption would have to be consented to by the natural father unless he had failed to contribute, commensurate with his ability, to the support of the child for two years. The husband and wife filed an affidavit that the first husband had not contributed to the support of the child and got the approval of the Court of Ordinary for the adoption. They gave no notice of any of it to the husband, although they knew his whereabouts, in Fort Worth. The adoption proceeding was in El Paso. The Texas court affirmed the procedure but the Supreme Court unanimously reversed, relying upon **Mullane**.

Lambert v. California, 355 U.S. 225, 2 L.ed. 2d 228, 78 S.Ct. 240 (1957). California law provided that it was unlawful for a person convicted of a felony to be or remain in Los Angeles for a period of more than five days without registering. Mrs. Lambert was convicted of violating this law but contended that she had no knowledge of the registration requirement. The Supreme Court reversed the conviction, saying the due process required that she have notice of the requirement. The Court cited **Mullane** in that connection.

In Re Gault, 387 U.S. 1, 18 L.ed. 2d 527, 87 S.Ct. 1428 (1967), the Supreme Court held that due process of law requires notice in writing of a juvenile court hearing "at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation." In this connection, it cited **Mullane**.

California v. Green, 399 U.S. 149, 26 L.ed. 2d 489, 90 S.Ct. 1930 (1970), discusses the right of the prosecution to use a witness's preliminary hearing testimony in connection with the accused's right of confrontation. Mr. Chief Justice Burger, concurring, cited **Mullane** in connection with the obligation of the prosecution to produce a witness. He said that a good faith effort to produce a witness was required.

The latest case that we find citing **Mullane** is **Williams v. Illinois**, 399 U.S. 235, 26 L.ed. 2d 586, 90 S.Ct. 2018 (1970), which held that it was unconstitutional to put an indigent in prison because he was unable to pay a fine. Mr. Justice Harlan, concurring in the result, said that he did not think "a state may, after declaring itself indifferent between a fine and jail, rely on the convenience of the latter as a constitutionally acceptable means for enforcing its interest, given the existence of less restrictive alternatives. Cf. **Mullane v. Central Hanover Trust Company.**"

For a comprehensive discussion of the subject as of 1957, see also Note, Requirements of Notice in In Rem Proceedings, 70 Harv. L. Rev. 1257 (1957).

It is necessary to make reference to **Scott v. Paisley**, 271 U.S. 632, 70 L.ed. 1123 (1926). That case upheld an earlier Georgia foreclosure procedure against a due process attack. The procedure under consideration did not require notice.

The case is distinguishable in that the plaintiff did not contend that there was any defense to the note involved,

and therefore she was not injured. Parties with different legal interests from those involved in the case at bar were contesting there.

Most important, however, it is quite clear that **Scott v. Paisley** applied ideas of due process which have been categorically rejected by later decisions of this Court. Our search reveals only one reference to it in later decisions of the Supreme Court. That was in **Security Mortgage Company v. Powers**, 278 U.S. 149, 73 L.ed 236 (1928), where **Scott v. Paisley** was mentioned in passing but was unimportant to the case which did not deal with the question of notice. Nor have we found any lower federal court decision relying upon **Scott v. Paisley** for any proposition other than that good title generally passes on a sale pursuant to a power, but not discussing the notice question. One such case (one of the two we found that was more recent than 1936) was **Young v. Ridley**, 309 F. Supp. 1308 (D.C. D.C., 1970), where the Court, however, took specific notice of a 30-day notice requirement present in that case which, of course, is a vital distinction. The other "modern" federal decision referring to **Scott v. Paisley** is **Admiral Company v. Thomas**, 164 F. Supp. 569 (D.C.D.C., 1958), where no constitutional question was raised.

It seems clear that **Scott v. Paisley** would not and should not be extended beyond its specific facts. It did not uphold the statutory provision involved in the case at bar and it is therefore no bar to the plaintiffs' recovery. However, if it is not distinguishable, **Scott v. Paisley** has been completely undermined by later cases and should be overruled.

CONCLUSION

For all these reasons, appellants submit that substantial federal questions are presented by the appeal which require plenary consideration, briefs on the merits, and oral argument for their resolution.

Respectfully submitted

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APPENDIX A

26533, 26534. GIORDANO ET AL. V. STUBBS ET AL.; AND VICE VERSA

Hawes, Justice. The appeal in this case is from the judgment of the Superior Court of DeKalb County denying the motion of the plaintiffs for a summary judgment against the defendant Stubbs for damages in the amount of $145,000, plus interest, and the cross appeal is from the denial of the defendant Stubbs' motion for a summary judgment in his favor as to all issues in the case. At issue is the validity of a sale by Stubbs, under power granted him in a deed to secure debt, of 35.52 acres of land located in Gwinnett County, Georgia. The undisputed facts show that Stubbs sold the land in question to one Donald E. Gaston on the 15th day of November, 1963, giving to Gaston a warranty deed therefor and receiving from Gaston a note and deed to secure debt in the amount of $30,000, payable interest only in semi-annual instalments of $900 each until November 14, 1969, at which time the principal balance with accrued interest thereon was due and payable. Gaston sold the property to a third party who, in turn, sold it to the plaintiffs, and the plaintiffs thereafter sold it to Bob E. L. Pope on the 31st day of July, 1969, for a recited consideration of ten dollars and other valuable consideration. As a part of the sale price from the plaintiffs to Pope, the latter gave to the plaintiffs a note and deed to secure debt in the amount of $163,500, and assumed the note and deed from Gaston to Stubbs in the amount of $30,000, as had each successive grantee prior to him. On November 1, 1969, Stubbs wrote to Joseph P. Giordano a letter advising him that, "Your note in the amount of $30,000.00, plus interest of $900.00 is due and payable Nov. 14, 1969. I have assigned this

note to the Trust Co. of Ga. Please mail check in the amount of $30,900.00 to Trust Co. of Ga., East Atlanta Branch, 514 Flat Shoals Ave., S. E., Att: Mr. Harold Williams." On December 11, 1969, the indebtedness not having been paid, the attorney for Stubbs wrote a letter to Gaston advising him of the non-payment of the note and notifying him of Stubbs' intention to institute legal proceedings to recover the same and to claim attorney's fees if the note should not be paid within ten days thereof. A copy of this letter was sent to Pope. On December 11, 1969, Stubbs secured the re-assignment of the note and deed to secure debt of Gaston to him from the Trust Company of Georgia. This re-assignment was filed for record on January 9, 1970, and recorded on January 13, 1970. Notice was published in the January 9, 16, 23 and 30th, 1970, issues of the Gwinnett Daily News that Stubbs, as attorney in fact for Donald E. Gaston under the deed to secure debt, would sell the property "by public outcry to the highest bidder for cash before the courthouse door in Gwinnett County, Georgia, within the legal hours of sale on the first Tuesday in February, 1970." On February 5, 1970, Joseph P. Giordano and Sam Giordano instituted their suit against Stubbs to enjoin the sale, to enjoin any proceeding to confirm the sale and to have the sale annulled, and for such other and further relief as might be deemed proper, lawful, equitable and just. Subsequently, the plaintiffs amended their complaint by adding Josephine Giordano as a party plaintiff, by adding the real estate firm of Summer-Minter & Associates, Inc., and Hugh Summer, one of the partners therein, as parties defendant and by adding demands for alternative relief in the form of a monetary judgment against Stubbs and against all the parties defendant on the basis of a claimed conspiracy to defraud. After receipt of interrogatories and answers thereto and after the filing of the depositions of the various parties and of witnesses, the judge of the

superior court passed an order denying all motions for summary judgment filed by the plaintiffs and by the defendant Stubbs and by the defendants Summer-Minter & Associates, Inc., and Hugh Summer. That judgment was certified for immediate review.

1. Applying the laws of this State to the above facts, the trial judge erred in not granting the motion for a summary judgment of the defendant Stubbs. The security deed from Gaston to Stubbs which contains the power of sale under which Stubbs proceeded, provides: "In case the debt hereby secured shall not be paid when it becom due by maturity in due course or by reason of a default as herein provided, grantor hereby grants to grantee the following irrevocable power of attorney: To sell the said property at auction, at the usual place for conducting sales at the court house in the county where the land or any part thereof lies, in said State, to the highest bidder for cash, after advertising the time, terms and place of such sale once a week for four weeks immediately preceding such sale (but without regard to the number of days) in a newspaper published in the county where the land lies, or in the paper in which the sheriff's advertisements for such county are published, all other notice being hereby waived by grantor, and grantee (or any person on behalf of the grantee) may bid and purchase at such sale . . ." This deed constituted a contract between Gaston as grantor and Stubbs as grantee, and its provisions are controlling as to the rights of the parties and their privies. Stubbs complied with its terms. He advertised the sale in the Gwinnett Daily News for four weeks immediately preceding holding it. On the sale day the property was auctioned off from the steps of the Gwinnett County Courthouse as required by the deed. It was bid in by Stubbs, as he was specifically authorized to do by its terms. Giordano complains that he was not notified; however, the record shows otherwise. There is

nothing in the security deed, nor in the laws of Georgia, which would require Stubbs to give actual notice that he was exercising the power of sale. Giordano, being in privity with the grantor in the deed to secure debt, was entitled to no other notice than the advertisement in accordance with the provisions of the security deed. The facts in the record disclose that Stubbs did actually notify his grantor, Gaston, and the record owner of the property, Pope, prior to the time of the sale, that the debt was in default. Giordano's claim that he was entitled to notice from Stubbs before he exercised the power of sale to foreclose the deed is totally without legal merit. The U. S. Supreme Court, in upholding a Georgia case, *Scott v. Paisley*, 158 Ga. 876 (124 SE 726), observed: "In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale, is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given . . . 'The law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar subsequent or junior lien or incumbrance upon the same property of his intention to sell the property under his mortgage or deed of trust. All that is required of him is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith.' " Scott v. Paisley, 271 U.S. 632, 635 (46 SC 591, 70 LE2d 1123). See, to the same effect: *Garrett v. Crawford*, 128 Ga. 519, 523 (57 SE 792, 119 ASR 398, 11 AC 167); *King v. Walker*, 141 Ga. 63, 64 (80 SE 312); *Ellis v. Ellis*, 161 Ga. 360, 362 (130 SE 681); *Kent v. Hibernia Savings &c. Assn.*, 190 Ga. 764, 765 (10 SE2d 759); *West Lumber Co. v. Schnuck*, 204 Ga. 827, 834 (51 SE2d 644); *Macy v. National Homeowners Sales Service Corp.*, 225 Ga. 93, 98 (165 SE2d 854); *Turpin v. North American Acceptance Corp.*, 119 Ga. App. 212, 216 (166 SE2d 588). The sale in this case was

advertised as provided in the security deed, and, also, as provided in *Code Ann.* § 67-1506. This was sufficient.

2. The Giordanos, appellants, and cross appellees, contend that the sale of the property by Stubbs was infected by several irregularities which would authorize a court of equity to set the same aside. None of these contentions is meritorious. In view of the ruling made in the preceding headnote, it was clearly immaterial that Stubbs had written Joseph Giordano that payment of the last instalment on the note, together with the interest, should be made to the Trust Company of Georgia. Giordano did nothing about making payment and he was not entitled to rely on that informal notice when the property was foreclosed upon strictly in accordance with the terms of the deed to secure debt. He also contends that the record ownership of the instrument foreclosed was in the Trust Company of Georgia on the date the first of the four weekly advertisements was run, and that the transfer of the instrument from the Trust Company to Stubbs was not recorded until some four or five days after the date of the first advertisement. Assuming, but not deciding, that the failure of Stubbs to record the re-conveyance of the instrument to him prior to the sale, or prior to its advertisement, would have constituted such an irregularity as, when accompanied by "gross inadequacy of price," would have authorized a court of equity to set the sale aside, there was no such irregularity in this case. The record shows that Stubbs filed for record the reassignment of the instrument to him on the day the first advertisement ran in the newspaper. This clearly met the requirements of the law, for it is the date of filing, and not the date of recording, that fixes rights under the law with respect to instruments required to be recorded. *Code* § 67-2501. *Durrence v. Northern Nat. Bank*, 117 Ga. 385 (43 SE 726); *Merchants' & Mechanics' Bank v. Beard*, 162 Ga. 446, 455 (134 SE 107).

3. Inadequacy of price paid upon the sale of property under power will not of itself and standing along be sufficient reason for setting aside the sale. It is only when the price realized is grossly inadequate and the sale is accompanied by either fraud, mistake, misapprehension, surprise or other circumstances which might authorize a finding that such circumstances contributed to bringing about the inadequacy of price that such a sale may be set aside by a court of equity. *Smith v. Ga. Loan &c. Co.*, 114 Ga. 189 (39 SE 846); *Croft v. Sorrell*, 151 Ga. 92 (106 SE 108); *Massey v. National Homeowners Sales Service Corp.*, 225 Ga. 93, 99, supra. There being no such circumstances accompanying the sale, as we have held in the preceding headnotes, the gross inadequacy, if such there was, in the sale price would not, standing alone, authorize a court of equity to set the sale aside. Under all the circumstances in this case, the defendant Stubbs was entitled to a summary judgment and the court erred in refusing to grant his motion therefor.

4. The foregoing disposes of the entire case and renders moot the questions raised on the main appeal.

Judgment reversed on the cross appeal; main appeal dismissed. All the Justices concur, except Felton, J., who dissents.

ARGUED MAY 11, 1971—DECIDED SEPTEMBER 27, 1971.

Injunction. DeKalb Superior Court. Before Judge Dean.

Haas, Holland, Freeman, Levison & Gibert, Hugh W. Gibert, for appellants.

Huie & Harland, Harry L. Cashin, Jr., Peek, Whaley, & Haldi, Glenville Haldi, Curtis R. Richardson, for appellees.

FELTON, Justice, dissenting in part. I recognize the principle cited in Division 3 of the majority opinion, that, in order to set aside a sale of property under power, not only

must the price realized be grossly inadequate, but also the sale must be accompanied by either fraud, mistake, misapprehension, surprise *or other circumstances which might authorize a finding that such circumstances contributed to bringing about the inadequacy of price.* No argument should be necessary to show that the price realized, $35,000, was grossly inadequate for the property sold, evidence of the value of which ranged from approximately $100,000 to $215,000. If the inadequacy of price be great, it is of itself a strong circumstance to evidence fraud (*Parker v. Glenn,* 72 Ga. 637 (2)); that circumstance, taken in connection with others of a suspicious nature, may afford such a vehement presumption of fraud, as will authorize the court to set aside the conveyance. *Lasater v. Petty,* 220 Ga. 592, 594 (140 SE2d 864) and cit. There are many cases from other jurisdictions to the effect that inadequacy of price great enough to shock the conscience of the court and raise a presumption or inference of fraud, may invalidate a sale. See 8 ALR 1001, 1004-1007 (III, IV) and cit. It is my position that the inadequacy of consideration here was great enough so that it alone was evidence of fraud sufficient to raise a jury issue and that, furthermore, the sale was accompanied by such "other circumstances" as are above mentioned.

It is true, as the majority opinion indicates, that Stubbs was authorized by the terms of the security deed to bid in the property himself, which he did through his agent. Apparently overlooked, however, has been the fact that Stubbs was acting in a dual role in the sale. He was not only the *buyer,* but also the *seller* under the irrevocable power of attorney granted him by the security deed, which constituted him an *agent* of the original grantor in the deed. That such agency was thereby created is indicated by the fact that "[t]he proper method to be employed by an attorney in fact in signing a deed for his principal is to sign the principal's name, with the additional state-

ment that it is done by him (the agent) as attorney in fact, thus: 'John Smith, by his attorney in fact, William Hall.' " Powell on Actions for Land, § 218, p. 231. Stubbs later became also the agent of the Giordanos, subsequent grantors in privity with the original grantor. *Delray, Inc. v. Reddick,* 194 Ga. 676 (22 SE2d 599, 143 ALR 519).

"An agent is a fiduciary with respect to the matters within the scope of his agency. The very relation implies that the principal has reposed some trust or confidence in the agent, and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal or employer. The fiduciary relationship existing between an agent and his principal has been compared to that which arises upon the creation of a trust, and the rule requiring an agent to act with the utmost good faith and loyalty toward his principal or employer applies regardless of whether the agency is one coupled with an interest, or the compensation given the agent is small or nominal, or that it is a gratuitous agency." 3 AmJur2d 580, Agency, § 199. "A power of sale is a trust." *Coleman v. Cabaniss,* 121 Ga. 281 (2) (48 SE 927). "Powers of sale in deeds of trust, mortgages, and other instruments shall be strictly construed *and shall be fairly exercised.*" (Emphasis supplied.) *Code Ann.* § 37-607. "The relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty and good faith to his principal. Any breach of this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud of such nature as to preclude the agent from taking or retaining the benefit." *Johnson v. Sherrer,* 197 Ga. 392, 396 (29 SE2d 581); *Harrison v. Harrison,* 214 Ga. 393 (1) (105 SE2d 214), citing *Code* §§ 4-205 and 37-708; *Forlaw v. Augusta Naval Stores Co.,* 124 Ga. 261 (6) (52 SE 898). "The general morality of the law is higher than many good people suppose . . . The standard it has in view is not merely con-

science, but enlightened conscience." *Barnes v. Mays,* 88 Ga. 696, 698 (16 SE 67); *Ga. Bapt. Orphans Home v. Moon,* 192 Ga. 81, 85 (14 SE2d 590). Although some of the decisions have applied these standards to the duty of plaintiffs, these great, immutable equitable principles, of necessity, are applicable equally to both parties. To further emphasize these standards, I cite again a portion of the opinion in Scott v. Paisley, 271 U.S. 632, 636, cited by the majority: "All that is required of him is to advertise and sell the property according to the terms of the instrument, *and that the sale be conducted in good faith.*" (Emphasis supplied.)

What did the exercise of the utmost good faith, loyalty and honesty require of Stubbs in the instant case? What kind of consent does the law contemplate in reference to one's consent that his agent purchase at his own sale? Does it mean a free and untrammeled one or one contained in a deed to secure debt, where the grantor has no choice but to consent and the knowledge of which in many cases is wholly unknown and unconsciously given? It has been held that "[t]he trustee or mortgagee must use reasonable effort to obtain a fair price for the property. It has been said that *he should obtain the greatest amount possible on foreclosure.*" (Emphasis supplied.) 55 AmJur2d 663, Mortgages, § 731. "Under Georgia law, the grantee-seller under power of sale in a security deed has a duty to sell the property at its fair market value. *Langley v. Stone,* 112 Ga. App. 237, 239 (2) (144 SE2d 627)." *Buckhead &c. Bldg. v. Oxford &c. Cos.,* 115 Ga. App. 534, 536 (154 SE2d 760). The provision of *Code Ann.* § 67-1504 (Ga. L. 1935, p. 381), that the payment of the true market value of property sold under power is a condition precedent to confirmation of the sale, should apply equally to a situation where no confirmation is sought; nay, even more so, since in such event the sale would otherwise escape the watchful, protective scrutiny of a court of equity.

Stubbs had the choice of reducing his claim to judgment and letting a neutral and impartial officer sell the land securing his debt or of selling the security under his power of sale, in which latter event he would act as attorney in fact of the owner, owing Gaston good faith in exercising the power as such agent. If good faith had been exercised and the property produced its fair market value, there would have been an excess of the amount owed by Gaston, which Stubbs would have held in trust for those who later bought the land and assumed existing loans. These subsequent purchasers were in privity with Gaston and the good faith duty of Stubbs inured to the benefit of all later purchasers, who would have been entitled to such proceeds as were sufficient to cover their claims in the event the property brought its true value or an amount approximating it.

Stubbs' selling the property at somewhere between approximately one third and one sixth of its value is not good faith toward Gaston and his privies, especially since he himself bought it and would stand to benefit tremendously by such transaction. Stubbs might have exercised the requisite good faith under the circumstances, for example, by paying a fair price for the property if he bought it himself, or even by refusing to sell it under his power of sale if a fair price could not be obtained, then having it sold either at another sale under his power or by judicial process. This failure to exercise good faith is sufficient, added to the gross inadequacy of the sale price, to render the sale void under the very decisions cited in the majority opinion. Another circumstance which easily could have contributed to bringing about the inadequacy of price, was the fact that the Trust Company was, at one time, a grantee of the security deed, then the instrument was transferred, perhaps unknown to subsequent privies of the parties thereto, back to Stubbs, who then foreclosed in his own name, which the grantors might not have

realized to be that of the grantee of the deed. There is evidence that when the Trust Company of Georgia re-transferred the security deed to Stubbs, it did not receive payment for Stubbs' indebtedness which the deed secured, but that it renewed Stubbs' note. Under such circumstances, the bona fides of the re-transfer of the security deed to Stubbs becomes vital in this case for solution by a jury.

I am aware of *Code* § 37-104, and cases holding to the effect that, before a debtor can have equitable relief against a sale under power in a security deed, he must pay or tender the principal and interest due. See *Gilbert v. Carson,* 213 Ga. 387, 389 (99SE2d 105) and cit. I do not believe that a tender was necessary in the present case, however; firstly, because, in addition to equitable relief, there was a demand for alternative relief in the form of a monetary judgment, which would be an adequate remedy. Secondly, "[i]n order for the plaintiff to prevail he must show that the circumstances complained of produced gross inadequacy of price, *and that he himself was free from fault.*" (Emphasis supplied.) *Croft v. Sorrell,* 151 Ga. 92, 96 (106 SE 108). Gaston and the other grantors have done nothing wrong or inequitable; hence, they are free from fault and in court with clean hands.

Even if a tender was required, moreover, "[d]elinquencies which have had no injurious consequences are held not to defeat a suit." 27 AmJur2d 674, Equity, § 138. The "clean hands" maxim "should not be applied where the defendant has not been seriously harmed, and the wrong complained of can be corrected." 27 AmJur2d 681, Equity, § 144. Certainly, it would be inequitable for the grantor to be required to have "cleaner hands" than the grantee. In this case, setting aside the sale under power would still leave Stubbs with all of his rights to exercise his rights to collect his debt, since only the sale, and not

the security deed, would be set aside. In other words, the original contract would still be intact and not affected by the voiding of this particular sale under power. It is in this respect that the present action differs from those to rescind or set aside merely a contract wherein the only rights or values accruing to the opposite party are held thereunder, and would be forfeited were it not for a tender in the amount of such opposite party's rights under the contract.

The complaint raised a jury question as to whether the circumstances justified the relief sought. However, there was various opinion testimony as to the value of the property sold, based upon which summary judgment can never issue. *Ginn v. Morgan*, 225 Ga. 192 (2) (167 SE2d 393). For the latter reason, I would affirm the lower court's judgment denying the motions for summary judgment of all of the parties and I dissent from the majority opinion reversing the judgment denying Stubbs' motion for summary judgment.

26536, 26537. STUBBS v. GIORDANO et al.; and vice versa.

ALMAND, Chief Justice. The above main and cross appeals involve the same parties, orders and issues as were in the cases of *Giordano, v. Stubbs*, 228 Ga. 75.

The judgment of this court in those cases renders unnecessary any judgment on the present main and cross appeals and they are

Dismissed. All the Justices concur, except Felton, J., who dissents.

ARGUED JUNE 14, 1971—DECIDED SEPTEMBER 27, 1971.

Injunction. DeKalb Superior Court. Before Judge Dean.

Huie & Harland, Harry L. Cashin, Jr., for appellant.

Haas, Holland, Freeman, Levison & Gibert, Hugh W. Gibert, Andrew C. Hall, for appellees.

26546. SUMMER-MINTER & ASSOCIATES, INC. et al. v. GIORDANO et al.

1. A civil conspiracy is a combination between two or more persons to do some unlawful act which is a tort or else to do some lawful act by methods which constitute a tort.

2. There is no evidence to show that the defendants were agents of the plaintiffs, that they occupied any confidential relationship toward the plaintiffs, or that they owed any duty to the plaintiffs.

3. There is no evidence whatsoever that a conspiracy existed between the defendants; there being no material issue as to the existence or non-existence of a conspiracy, the court erred in denying the motion for summary judgment.

ARGUED JUNE 14, 1971—DECIDED SEPTEMBER 27, 1971.

Injunction. DeKalb Superior Court. Before Judge Dean.

Curtis R. Richardson, for appellants.

Peek, Whaley, & Haldi, Glenville Haldi, Haas, Holland, Freeman, Levison & Gibert, Hugh W. Gibert, Andrew C. Hall, Huie & Harland, Harry L. Cashin, Jr., for appellees.

ALMAND, Chief Justice. In February, 1970, Joseph and Sam Giordano filed their complaint against H. F. Stubbs, seeking to annul and set aside a foreclosure sale, under power given in a security deed, of a described tract of land in Gwinnett County, and for a money judgment against Stubbs.

APPENDIX B

In the Superior Court of DeKalb County,
State of Georgia

Joseph Giordano, Sam Giordano and Josephine Giordano,
Plaintiffs,

v.

H. F. Stubbs, Bob E. L. Pope, Summer-Minter and Associates, Inc., and Hugh Summer,
Defendants.

Civil Action
File No. 54,927

ORDER

(Filed March 8, 1971)

The Court having considered the motions for summary judgment filed respectively by the plaintiffs, the defendants, Hugh Summer and Summer-Minter and Associates, Inc., and the defendant Stubbs, and the Court having considered the affidavits, depositions and other matters in support of and in opposition to the said motions, and the Court having heard oral argument and received and considered briefs of each of the said parties, the Court is of the opinion that there exist genuine issues as to material facts, Wherefore

IT IS HEREBY ORDERED AND ADJUDGED that the various motions be and they are hereby denied.

In accordance with Section 81A-156(h), of the Georgia Code as amended (Section 56(h) of the Civil Practice Act), the Court hereby certifies that this Order should be subject to review.

This 8th day of March, 1971.

WILLIAM T. DEAN
Judge, Superior Court of DeKalb County

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-831

JOSEPH GIORDANO, SAM GIORDANO and JOSEPHINE GIORDANO,
Appellants,

v.

H. F. STUBBS, BOB E. L. POPE, SUMMER-MINTER AND ASSOCIATES, INC., and HUGH SUMMER,
Appellees.

On Appeal from the Supreme Court of Georgia

MOTION OF APPELLEE H. F. STUBBS TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-831

JOSEPH GIORDANO, SAM GIORDANO and JOSEPHINE GIORDANO,
Appellants,

v.

H. F. STUBBS, BOB E. L. POPE, SUMMER-MINTER AND ASSOCIATES, INC., and HUGH SUMMER,
Appellees.

On Appeal from the Supreme Court of Georgia

MOTION OF APPELLEE H. F. STUBBS TO DISMISS

Appellee H. F. STUBBS moves the Court to dismiss the appeal herein on the grounds that (1) the judgment appealed from rests on an adequate non-federal basis, and (2) the case presents no substantial federal question not previously decided by this Court.

I

THE NATURE OF THE CASE AND THE STATE STATUTE ALLEGEDLY INVOLVED

A. State Statute Allegedly Involved

This appeal calls into question the long-standing procedures of many states with regard to security interests in land and the means of exercising same. Specifically, Appellants attack the constitutionality of contractual powers of sale in deeds to secure debt. More precisely, they seek to overturn a Georgia statute which recognizes the freedom of contracting parties to waive statutory notice requirements in foreclosure proceedings.

The statute allegedly at issue is 1935 Georgia Laws 381, Georgia Code Annotated § 67-1506, which provides:

> "No sale of real estate under powers contained in mortgages, debts, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of sheriff's sales in the county in which such real estate, or a part thereof, is located."

Indirectly, by necessary reference, the Georgia statutes concerning notice as to sheriffs' sales, Georgia Code Annotated §§ 39-1101, 39-1102, are likewise called into question. These latter sections require notice of such sales by publication in a newspaper published in, or of general circulation in, the county in which the sale is to take place once a week for four weeks immediately preceding the date of the sale. Thus, these statutes permit the exercise of a contractual power of sale in a security deed in accordance with the terms thereof, and in the absence of specific contractual terms as to notice of the sale, they require notice to all interested parties by advertisement once a week for four weeks.

Appellants contend that these statutes deprived them of their subordinate security interest in the property in question without due process of law by failing to require that they be given actual notice of the time and terms of the foreclosure sale. Appellee Stubbs submits that the constitutionality of these statutes is not properly in issue here for the reason that the foreclosure sale in question, and the notice given thereof, were conducted in accordance with the provisions of a private contract and were not governed by, or carried out pursuant to, statutory foreclosure procedures.

B. Nature of the Case and Proceedings Below

The facts of the case are adequately summarized in the opinion of the Georgia Supreme Court from which this appeal is taken, *Giordano v. Stubbs*, 228 Ga. 75, 184 S.E. 2d 165 (1971) (attached as Appendix A to Appellant's Jurisdictional Statement), and require only a brief restatement here. Appellee Stubbs conveyed a tract of land by warranty deed to one Donald Gaston in 1963, receiving as partial consideration therefor a promissory note and a deed to secure debt, which secured the payment of the note. There were no prior encumbrances on the property, so that Stubbs' security interest became the senior encumbrance. Under Georgia law, the security deed constituted an absolute conveyance of title to Stubbs, subject to the right of the grantor to have the property reconveyed to him upon payment of the debt secured thereby. GA. CODE ANN. § 67-1301. Thus Stubbs received legal title to the property, Gaston taking equitable title or an equity of redemption. The security deed contained a power of sale authorizing Stubbs to sell the property at public auction in the event of a default in payment of the note.

Gaston subsequently conveyed his equity of redemption in the property to a third party, who in turn conveyed it

to the Appellants, in each case the purchaser assuming the obligation of satisfying the outstanding promissory note given by Gaston to Stubbs. The Appellants then conveyed their equity of redemption to one Bob E. L. Pope in 1969, and received in partial consideration therefor a promissory note and a second deed to secure debt. Appellants concede that this second security interest was subordinate to the outstanding security interest of Stubbs under his prior security deed.

Hence, when the principal balance and accrued interest under the 1963 promissory note from Gaston to Stubbs came due on November 14, 1969, Pope was record owner of the property in question, subject to the senior security interest of Stubbs and the junior security interest of Appellants. Stubbs wrote to the Appellants on November 1, notifying them that his note was due and payable on November 14. On December 11, after the debt had been in default for approximately one month, Stubbs gave written notice to his original grantor, Gaston, of the default and of his intention to exercise the power of sale in the security deed if the note was not paid in ten days. By copy of said letter, he provided like notice to the then owner of record, Pope. These notices were not required by the security deed or by Georgia law, either of which would have authorized Stubbs to begin proceedings to exercise the power of sale as of the date of the default.

Thereafter, Stubbs received no response nor tender of payment on the note from anyone, and accordingly proceeded to exercise the power of sale by publishing notice of the sale once a week for four weeks as provided in the security deed. On the advertised date, the property was sold to the highest bidder at public outcry from the steps of the Gwinnett County, Georgia, courthouse.

After the sale had taken place, Appellants instituted this action in the DeKalb County Superior Court to

annul the sale and to enjoin any proceeding to confirm the sale. The Appellants raised various issues, including fraud, conspiracy to defraud, and absence of valid title to exercise the power of sale. However, the only issue relevant here was injected by the Appellants by amendment to their complaint, to-wit: whether exercise of the power of sale by Stubbs upon notice by publication in accordance with the terms of the security deed, and without giving Appellants actual, personal notice of the sale prior thereto, deprived Appellants of their junior security interest in the property without due process of law.

All parties filed motions for summary judgment, which were denied by the trial court. Each of the parties then appealed the denial of their respective motions to the Supreme Court of Georgia. On September 27, 1971, the Georgia Supreme Court affirmed the trial court's denial of Appellants' motion, but reversed the trial court as to the motions of Appellee Stubbs and the other Defendants and ordered that summary judgment be entered for all Defendants.

All of the issues raised by Appellants, including the notice issue, were disposed of by the Georgia Supreme Court on grounds of state contract and property laws. However, Appellants seeks to have this Court overturn that judgment on the sole ground that the failure of Georgia law to require Appellee Stubbs to give them actual, personal notice of the exercise of the power of sale, notwithstanding the express contractual waiver of personal notice in the security deed, resulted in a deprivation of their junior security interest without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

II

THE JUDGMENT APPEALED FROM RESTS ON AN ADEQUATE NON-FEDERAL BASIS

In framing the "questions presented" in their Jurisdictional Statement, Appellants conveniently ignored the existence of the contractual power of sale in Appellee Stubbs' security deed and the fact that the foreclosure sale was conducted pursuant thereto. They would have this Court believe that the sale was governed by Georgia Code § 67-1506, which requires, in the absence of contractual provisions to the contrary, that notice by published advertisement be given prior to the exercise of powers of sale contained in mortgages, deeds to secure debt, and other such security instruments. They contend that such published notice is, as to holders of junior security interests in the subject property, insufficient to satisfy the requirements of due process of law. The legal insubstantiality and impractical consequences of this contention are discussed in Part III *infra*, beginning at page 11. However, Appellee Stubbs would first submit that the abstract constitutionality of § 67-1506 need not be considered by this Court for the reason that the judgment of the Georgia Supreme Court on the notice issue rested on adequate non-federal grounds, to-wit: that the notice required of Appellee Stubbs in exercising the power of sale in question was not governed by Georgia Code § 67-1506, but rather by the contractual terms of the security deed which created the power.

In selling the property at public auction to satisfy the defaulted note from Gaston, Appellee Stubbs was exercising the power of sale contained in the deed to secure debt which he received from Gaston in 1963. The Georgia Supreme Court began its opinion by quoting the provisions of this power of sale, which authorized Stubbs, in the

event of default, to sell the property at auction at the county courthouse to the highest bidder "after advertising the time, terms and place of such sale once a week for four weeks immediately preceding such sale (but without regard to the number of days) in a newspaper published in the county where the land lies, or in the paper in which the sheriff's advertisements for such county are published, *all other notice being hereby waived by grantor, . . .*" 228 Ga. 75, 77, 184 S.E.2d 165, 167 (1971) (emphasis added). The Court then held:

> This deed constituted a contract between Gaston as grantor and Stubbs as grantee, and *its provisions are controlling as to the rights of the parties and their privies.* Stubbs complied with its terms. . . . *Giordano complains that he was not notified; however, the record shows otherwise.* There is nothing in the security deed, nor in the laws of Georgia, which would require Stubbs to give actual notice that he was exercising the power of sale. *Giordano, being in privity with the grantor in the deed to secure debt, was entitled to no other notice than the advertisement in accordance with the provisions of the security deed.*

Ibid. (emphasis added). The Court then quoted from *Scott v. Paisley*, 271 U.S. 632 (1925), discussed *infra* at p. 12, which affirmed 158 Ga. 876, 124 S.E. 726, to support the validity of contractual notice provisions in security deeds.

In short, Appellee Stubbs, in exercising the power of sale, was compelled to, and did, comply with the notice provisions contained in that power of sale. Coincidentally, the notice provisions contained in the security deed were identical to the notice requirements in Georgia Code § 67-1506, which would have governed in the absence of contractual terms specifying the notice required. However, it is clear from the above-quoted language of the opinion

that the Georgia Supreme Court disposed of the constitutional issue on the grounds that the published notice satisfied the terms of the security deed, not on the ground that it coincidentally met the requirements of § 67-1506 as well. In other words, the Georgia Supreme Court merely upheld the constitutional validity of contractual notice provisions; therefore, the issue of whether or not the requirements of § 67-1506 would, in the absence of contractual notice provisions, satisfy due process is not properly presented to this Court by the record in this case.

Accordingly, even if it is assumed, *arguendo*, that due process of law would, in the abstract, have entitled Appellants, and any other parties having a recorded legal or equitable interest in the subject property, to actual notice of the sale, it is clear that the right to such notice was expressly waived by the terms of the power of sale. For the deed to secure debt containing the power of sale specifically provided for notice by publication, "all other notice being hereby waived by grantor, . . ." 228 Ga. 75, 77, 184 S.E.2d 165, 167.

It is equally clear that this waiver was valid and binding, for this Court has often held that constitutional rights may be waived when no question of public policy or public morals is involved. *E.g., Boddie v. Connecticut*, 401 U.S. 371 (1971) ("the hearing required by due process is subject to waiver"); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407 (1917) and cases cited at 244 U.S. 411-12; *Pierce v. Somerset R.R. Co.*, 171 U.S. 641 (1898). This principle is particularly applicable in the case of individual property rights such as are allegedly involved here. See *e.g., Shepard v. Baron*, 194 U.S. 553 (1904), where this Court observed: "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good con-

sideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up." 194 U.S. at 568. For a thorough discussion of the waiver of constitutional property rights see *Smith v. Bell*, 129 W. Va. 749, 41 S.E.2d 695 (1947), in which the West Virginia Supreme Court reviewed numerous authorities and upheld the constitutionality of a waiver by the grantor of a deed of trust of his statutory right to personal notice of sale, noting that no considerations of public policy were involved. See also *McCormick v. First National Bank of Miami*, 322 F.Supp. 604, 607 (S.D. Fla. 1971), in which the Court held that summary repossession of an automobile without notice, pursuant to the terms of a conditional sales contract, did not violate due process or constitute an illegal search and seizure, the right to notice having been waived by the contract.

Thus, whatever notice rights Gaston, as grantor of the security deed, had under due process or state law, could have been and were expressly waived by written agreement. This waiver was part of a validly recorded security deed, and hence, under Georgia law, was binding upon all parties, including Appellants, who subsequently obtained an interest in the land. For such subsequent parties in interest were on public notice as to the terms of the recorded security deed and took their interest in the property subject to all of the terms thereof. *Georgia Code Ann.*, §§ 67-1305, 67-2501, 29-401, 29-401.1; *Cook v. Georgia Fertilizer & Oil Co.*, 154 Ga. 41, 113 S.E. 145 (1922). ("[a] security deed to land conveys the legal title to the vendee, and the rights of the vendee cannot be affected by subsequent acts of conveyance by the vendor to third parties"). Indeed, throughout these proceedings Appellants have conceded that they obtained and then reconveyed the property subject to, and with notice of, the

prior recorded security deed to Appellant Stubbs and all the terms thereof.

In summary, the power of sale, and the notice requirements applicable to the exercise thereof, were dictated by the security deed creating the power. All notice other than that provided for in the security deed was expressly waived by the terms thereof. Hence, even if due process would have compelled actual notice to the grantor, he contractually waived any such right. That such a waiver of the constitutional right to actual notice, if it exists, is valid and enforceable is beyond question. Equally without doubt is the fact that this waiver by the grantor of the security deed was binding on Appellants and all other parties taking an interest in the property from and through the grantor and subject to, and with notice by recording of, the prior security deed.

Accordingly, the failure of Appellants in this case to receive actual notice was not caused by Georgia Code §67-1506, but rather by the contractual waiver of all notice other than by publication. Therefore, as the District Court for the District of Columbia recently observed in the very similar case of *Young v. Ridley*, 309 F. Supp. 1308, 1313 (D.D.C. 1970), Appellants' contentions "run not to the validity of the statute, but rather to the reality of the agreement . . ." Stated another way, the exercise of the power of sale was pursuant to private contract, not involving state action, and "[t]he fourteenth amendment, of course, applies only to state action." *Jewell v. City of Covington*, 459 F.2d 459 (5th Cir. 1970). The Georgia Supreme Court recognized this fact and founded its decision that Appellants were not entitled to actual notice, not on the constitutional validity of §67-1506 in the abstract, as Appellants contend, but rather on the grounds that:

> This [security] deed constituted a contract between Gaston as grantor and Stubbs as grantee, and its

> provisions are controlling as to the rights of the parties and their privies. . . . Giordano, being in privity with the grantor in the deed to secure debt, was entitled to no other notice than the advertisement in accordance with the provisions of the security deed.

Giordano v. Stubbs, 228 Ga. 75, 77, 184 S.E.2d 165, 167 (1971).

For these reasons, Appellee Stubbs submits that the decision of the Georgia Supreme Court denying the right of Appellants to actual notice in this case was based on adequate grounds of state contract and property laws, not on the abstract constitutional validity of Section 67-1506 of the Georgia Code, and, therefore, that this Court should dismiss this appeal.

III

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

As discussed above, Appellants have not contested the validity of the security deed which created the power of sale and specified the notice required in the exercise thereof. Rather, they have chosen to ignore the security deed and would have this Court do likewise. However, as demonstrated in Part II *supra*, the Georgia Supreme Court properly considered Appellants' attack on Georgia Code §67-1506 in the light of the contractual provisions in the security deed, and hence, so must this Court for purposes of the instant appeal. Therefore, since the notice and sale complied with the security deed, as the Georgia Court so held, Appellants' constitutional attack on §67-1506, for purposes of this appeal, must necessarily be read as urging the dual propositions that: (1) the states

are required by the due process clause of the Fourteenth Amendment to compel actual notice of foreclosure proceedings to junior encumbrancers in all circumstances; *and* (2) that the states are further required to prohibit any waiver by private contract of this right to actual notice. To the extent of rejecting this latter proposition the Georgia Supreme Court did determine the constitutionality of §67-1506 by upholding the contractual power of sale. This implicit holding that §67-1506 did not violate due process in failing to prohibit the contractual waiver of whatever form of notice due process might have required in the absence of contract is the sole constitutional determination which can be read into the Georgia Supreme Court's opinion. This implied constitutional determination does not present a substantial federal question for review by this Court for the reason that prior decisions of this Court have authoritatively rejected Appellants' position and there are no circumstances present in the instant case which would warrant its reconsideration.

That constitutional rights in general, and property rights in particular, are subject to voluntary waiver has been firmly established by this Court. See discussion at p. 5, *supra*. This proposition has been implicitly applied in circumstances similar to the instant case. In *Scott v. Paisley*, 271 U.S. 632 (1926), this Court considered an almost identical situation on writ of error to the Georgia Supreme Court. There the plaintiff in error, Mrs. Scott, had purchased land subject to an outstanding security deed. Upon default in the note secured by the security deed, the grantee brought suit against the grantor in the security deed without notice to Mrs. Scott and recovered judgment on the note. Thereafter, the sheriff levied an execution on the land, and, after advertisement, sold it at public auction to satisfy the judgment. Mrs. Scott sued to have the sale set aside on the ground that §6037 of the Georgia Code of 1910, pursuant to which the sale was

held, deprived her of her interest in the property without due process of law in that she was not given notice of the proceeding to sell the land.

In upholding the statute and the sale thereunder, the Court conclusively established the validity of contractual powers of sale and the notice provisions therein, stating:

> . . . The validity of such a contractual power of sale is unquestionable . . . in the absence of a specific provision to that effect, *the holder of a mortgage or trust deed with power of sale is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer*; and the validity of the sale is not affected by the fact that such notice is not given . . . [citations omitted] . . . "*the law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar lien or incumbrance upon the same property of his intention to sell the property under his mortgage or deed of trust.* All that is required of him is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith. . . ."
>
> So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power. And §6037 neither deprives him of property without due process of law nor deprives him the equal protection of the laws.

271 U.S. at 635 (emphasis added). The Court in *Scott* relied upon the previous Supreme Court decision in *Bell Silver & Copper Mining Co. v. First National Bank*, 156 U.S. 470 (1895), as well as numerous state court decisions.

Although *Scott* involved a sale pursuant to statutory procedures, its applicability to the present circumstances was clearly indicated by the Court when it observed that the effect of §6037 was "no more than if it conferred upon the holder of the secured debt a statutory power of sale, which may be treated as equivalent, insofar as the constitutional question is concerned, to an express power of sale in a mortgage or trust deed." 271 U.S. at 635. Hence Appellants' attempt to distinguish *Scott* on the theory that there was no defense to the note involved, and therefore Mrs. Scott was not injured, seems clearly futile. For there was likewise no defense in this case to the fact that the note was valid and in default; and as to injury, Mrs. Scott suffered even greater injury than Appellants, for she was the record owner and in possession of the property at the time of the sale, so that she lost her equity of redemption, whereas Appellants held only a junior security interest in this case, having conveyed their equity of redemption to a subsequent purchaser. Therefore, in contemplation of law, Appellants may suffer no injury at all, for they still have an enforceable note against the purchaser which may be brought to judgment and satisfied out of other assets of the purchaser. All that they have lost is the right to have that note satisfied out of this particular property. Thus, the similarity of the facts and the language used by the Court compel the conclusion that *Scott* is applicable to the instant case. Indeed, the primary holding in *Scott* directly affirms the constitutionality of the notice by publication provisions of §67-1506, and would therefore require approval of the sale in question even if the contractual notice provisions had not existed or had not been applicable to Appellants.

Realizing the applicability of *Scott*, Appellants seek to establish a substantial federal question on the grounds that *Scott* has been undermined by later decisions of this Court concerning the notice required by due process in

other types of legal proceedings. It should be noted at the outset that every single case cited by Appellants for this proposition is distinguishable from the present situation on the same ground. That is, the notice procedures used in the present case were bargained for and made a part of a valid contractual agreement, whereas in the cases relied upon by Appellants the notice procedures were not agreed to by the plaintiffs or their privies in contract. This distinction, which presumably motivated Appellants to ignore the security deed in framing their "questions presented," has been recognized by the lower federal courts. See, e.g., *Young v. Ridley*, 309 F.Supp. 1308 (D.D.C. 1970), in which the Court, citing *Scott* and *Bell Mining*, upheld the District of Columbia statute authorizing foreclosure under contractual powers of sale. Rejecting the due process argument, "[t]he Court [was] not persuaded that the Supreme Court in *Sniadach* [Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969)] intended to question these previous opinions approving contractual powers of sale." *Id.* at 1312.

Appellants place primary reliance upon *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), in which this Court invalidated a New York statute which permitted trust companies to pool small trust accounts into a common fund for investment administration. The statutory provisions allowing judicial settlement of the common fund among the participating accounts upon notice by publication was held to be a denial of due process as to those trust beneficiaries whose names and addresses were known to the trust company. In so holding, the Court made it clear that notice by publication would satisfy due process under many circumstances.

There is nothing in *Mullane* which would cast doubt upon the legal capacity of contracting parties to specify the form of notice required and to waive the notice which might

otherwise be required by statute or due process; for there was no such waiver or contractual agreement as to notice present in *Mullane*, nor were the beneficiaries actually notified of the proceedings. On the other hand, the Appellants in this case were notified by Stubbs of the fact that the note was due. With this notice, and their knowledge of the existence of the power of sale in the recorded security deed, Appellants had ample opportunity to ascertain that the note was in default, that the power of sale was being exercised, and to appear and bid at the sale. Their complete lack of diligence to act upon their knowledge, not any unfair conduct on the part of Stubbs, resulted in their junior security interest being cut off. For these reasons, *Mullane* is clearly inapplicable to the present case.

Each of the *Mullane* progeny cited by Appellants is likewise distinguishable for the same legal and factual reasons. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), involved the condemnation of property by a city after only published notice of the hearing on compensation. The compensation hearing was obviously a judicial proceeding in the nature of litigation, and is clearly distinguishable from a private sale under power pursuant to a contract of which all interested parties had notice. The same distinctions apply to *Schroeder v. New York*, 371 U.S. 208 (1962), which also involved proceedings in the nature of condemnation, as well as to *Covey v. Summers*, 351 U.S. 141 (1956), which held that notice by publication of foreclosure proceedings to satisfy a tax lien was not reasonably calculated to protect a person known by the city officials to be mentally incompetent.

Other notice cases relied upon by Appellants are subject to the same distinctions and involve even more remote factual situations. *New York v. New York, N.H. & H.R.R. Co.*, 344 U.S. 293 (1953), involved a deprivation of the city's non-contractual lien rights upon published

notice of a bankruptcy reorganization, whereas *Marin v. England,* 385 U.S. 99 (1966), protected a bank in honoring checks drawn by a bankrupt after the filing of a voluntary bankruptcy petition of which the bank had no notice. Even further removed are *Lambert v. California,* 355 U.S. 225 (1957) (registration requirements for convicted felons); *Armstrong v. Manzo,* 380 U.S. 545 (1965) (adoption proceedings without notice to natural father); and *In Re Gault,* 287 U.S. 1 (1967) (juvenile court hearing without notice).

Lastly, Appellants rely on the more recent case of *Sniadach v. Family Finance Corporation,* 395 U.S. 337 (1969), which has promoted considerable analysis of the current view of this Court concerning procedural due process. *Sniadach* invalidated a Wisconsin statutory procedure which allowed the freezing of an alleged debtor's wages during the period between the filing of a garnishment and the rendering of a judgment on the debt. Aside from the fact that the debtor had not contractually agreed to prejudgment garnishment, there was no question of notice involved since the defendant received notice of the proceedings on the same day as the garnishee. As previously noted at page 15 *supra,* the distinctions between *Sniadach* and contractual foreclosure proceedings were clearly recognized in *Young v. Ridley,* 309 F.Supp. 1308, 1313 (D.D.C. 1970), in which the Court noted "the differentiating element of a bargained-for procedure" and "the importance of the bargain concept to the validity of summary foreclosure" as voiced by the Supreme Court in *Scott v. Paisley* and the *Bell Mining* case. The Tenth Circuit has likewise rejected the applicability of *Sniadach* to summary repossession and sale of secured property pursuant to the terms of a conditional sales contract on the grounds that the procedure used was expressly agreed to. *Brunswick Corporation v. J & P, Inc.,* 424 F.2d 100, 105 (10th Cir. 1970). *Accord, McCormick v. First National*

Bank of Miami, 322 F.Supp. 604, 607 (S.D. Fla. 1971); *Fuentes v. Faircloth*, 317 F.Supp. 954 (S.D. Fla. 1970) (3-judge court).

Thus, despite the passage of many years, *Scott* and *Bell Mining* have retained their vitality because of the sound legal principle upon which they are based, *i.e.*, that parties are free to establish and regulate their private property rights by contract. Even in the absence of contractual notice provisions, *Scott* teaches that parties are on record notice as to all contractual and statutory provisions binding upon their real property, and that they are therefore charged with the duty of making such inquiries and taking such action to protect their interests as this knowledge dictates. This is but another reason why *Scott* has not been vitiated by *Mullane* or its progeny.

For these reasons, powers of sale as a means of exercising security interests have continued to be prevalent throughout the United States, and the validity of proceedings held under such powers has been repeatedly sustained. This is demonstrated by a review of authorities in the real property field. The 1970 edition of *Powell on Real Property* notes that at least twenty-one states recognize foreclosure of security interests in land by power of sale, 3 R. POWELL, REAL PROPERTY ¶468, p. 696.28, n. 2 (1970 ed.), and that "notice is customarily given by advertisement." *Id.* at p. 696.30 and cases cited in n. 12. Similarly, the following observations on powers of sale are contained in 10 G. THOMPSON, REAL PROPERTY §5180 (Grimes ed. 1957):

> The notice usually required in powers of sale is a publication for a certain length of time in one or more newspapers published in the county in which the premises are situated.

Id. at p. 233.

> In the absence of statutory requirements, the kind of notice, place where it shall be given, the time when

it shall be given, and the duration or number of publications *are properly subjects of contract between the parties, and their agreement is binding upon them.*

Id. at p. 234 and cases cited in n. 41 (emphasis added).

No notice at all is necessary unless made so under a statute, or by virtue of the power itself. When there is no statute requiring the creditor to give notice to the debtor of his intention to exercise the power of sale, and the instrument contains no provision in reference to notice other than that the time and place shall be advertised in a given way, no other notice is required than advertisement in the manner prescribed in the instrument . . . *The notice when provided for may be waived* . . .

Id. at 235 and cases cited in nn. 47, 48, 52 (emphasis added).

When a power of sale provides only for a published notice, this is all that any one interested in the property is entitled to, unless there be an agreement for an express notice.

Id. at 236 and cases in n. 55 (emphasis added).

Unless the statute or the mortgage so provides a junior encumbrancer is not entitled to a notice of the sale.

Id. at 237 and cases in n. 66.

Representative cases through the years which have relied upon *Scott* and *Bell Mining* to sustain the constitutional validity of the exercise of contractual powers of sale on notice by publication include: *Curti, v. Pacific Mtge. Guaranty Co.*, 87 F.2d 42, 43 (9th Cir. 1936); *Gamble v. White*, 56 F.2d 814, 821 (10th Cir. 1932); *Equitable Royalty Corp. v. Oklahoma*, 352 P.2d 365, 372 (Okla. 1960); *Lancaster Security Investment Corporation v. Kessler*, 159 Cal. App. 2d 649, 324 P.2d 634, 637-38 (1958);

Armille v. Lovett, 100 N.H. 203, 122 A.2d 265, 267 (1956); *Smith v. Bell*, 129 W.Va. 749, 41 S.E.2d 695 (1947); *cf. Schultz v. Walker*, 130 F.2d 907 (7th Cir. 1942); *Admiral Company v. Thomas*, 164 F. Supp. 569, 570 (D.D.C. 1958); *Great Falls National Bank v. McCormick*, 448 P.2d 991 (Mont. 1968).

Finally, the rationale of *Scott* was indirectly affirmed by this Court in 1960 in *United States v. Brosnan*, 363 U.S. 237 (1960). *Brosnan* involved two cases in which federal tax liens were extinguished under state law, one by a judicial foreclosure sale and the other by a private sale pursuant to a power of sale in a deed of trust. In each case the United States was not made a party to, and had no notice of, the sale proceedings. In each case the tax liens were concededly junior to defaulted mortgages. Thus, the United States stood in a position virtually identical to that of Appellants, although the issue was not cast in terms of due process because the government was the aggrieved party. Even though the government had not contractually waived notice of the foreclosure proceedings, as was done in the instant case, this Court nevertheless sustained the sales and their effect of cutting off the tax liens. In so doing, the Court wrote:

> . . . [W]hen Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. *Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt.*

363 U.S. at 242 (emphasis added).

The effect of *Brosnan* was reversed by Congress by the Federal Tax Lien Act of 1966, codified as Section 7425 of the Internal Revenue Code of 1954, which makes any judicial or non-judicial foreclosure sale ineffective to discharge recorded federal tax liens unless the United States has notice of the proceedings. However, the respect of *Brosnan* for established state property laws and its recognition of the disruption which would result from a wholesale invalidation of same remain viable and applicable to the private procedures challenged in the instant case. For if this Court were to hold that contracting parties may not agree to waive a particular form of notice which might, in the absence of agreement, be required, such a decision would invalidate innumerable time-honored laws and usages in every state governing real property, personal property and the law of contracts in general. Holders of security interests in all types of property would be saddled with the unreasonable burden of having to track down all parties having lien rights, security interests, or other legal or equitable interests in the property before exercising their right to have a defaulted debt satisfied out of the property. Moreover, every completed foreclosure proceeding, judicial or non-judicial, would, absent a bar by the statute of limitations, be subject to annulment, and countless security deeds presently on the books would be rendered virtually meaningless. The result would be complete chaos as to real and personal property ownership throughout the country. As stated by the District Court for the District of Columbia in upholding a statute authorizing extrajudicial foreclosure proceedings under power of sale, "[a] contrary decision would cast doubt on the validity of many provisions normally contained in commercial instruments which traditionally have been thought properly subject to the contractual agreement of the parties." *Young v. Ridley*, 309 F.Supp. 1308, 1313 (D.D.C. 1970). Such a

result was not intended by, nor can it be implied in, *Mullane*, nor *Sniadach*, nor any of the other post-*Mullane* notice cases.

In summary, the record in this case does not present the question posed by Appellants of whether the authorization, in §67-1506, of foreclosure upon notice by publication only, in the absence of contractual notice provisions, violates due process. *Scott v. Paisley* and other decisions of this Court indicate that were this issue present, it should be answered in the affirmative. Be that as it may, a contractual waiver of all notice other than by publication was present in this case. It was upon this contract and Stubbs' compliance therewith, as well as upon the fact that Appellants had actual notice that the note was due and that the power of sale existed, that the Georgia Supreme Court rested its decision upholding the adequacy of the notice given. Therefore, for this Court to entertain this appeal and reverse the Georgia Supreme Court, it would have to hold not only that due process requires actual notice of foreclosure proceedings to junior encumbrancers in all circumstances, but also that the notice rights inherent in procedural due process may not be contractually waived. Such a decision would seem to be conclusively precluded by *Scott v. Paisley* and other opinions of this Court, as well as by the chaotic results which such a ruling would produce. For these reasons it is respectfully submitted that the federal question sought to be raised by this appeal is so unsubstantial as not to require further argument and that the appeal should therefore be dismissed.

IV

CONCLUSION

Wherefore, Appellee H. F. Stubbs moves the Court to dismiss this appeal on the grounds that the judgment appealed from rests on an adequate non-federal basis and the case presents no substantial federal question not previously decided by this Court.

Respectfully submitted

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Certificate of Service

I, James R. Harland, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a true and correct copy of the foregoing Motion to Dismiss has been served upon counsel of record for Appellants in this case, by placing same in the United States mail, postage prepaid, addressed to Mr. Hugh W. Gibert, Haas, Holland, Levison & Gibert, 2709 First National Bank Tower, Atlanta, Georgia 30303.

This 20th day of January, 1972.

/s/ James R. Harland, Jr.

SUPREME COURT, U. S

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971.

No. 71-831

JOSEPH GIORDANO, SAM GIORDANO and JOSEPHINE GIORDANO,
Appellants,

v.

H. F. STUBBS, BOB E. L. POPE, SUMMER-MINTER AND ASSOCIATES, INC., and HUGH SUMMER,
Appellees.

On Appeal from the Supreme Court of Georgia

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Appellants respectfully request the Court's consideration of this Reply Brief.

WAIVER

In his motion to dismiss, appellee Stubbs relies principally upon a contention that the appellants waived their constitutional right to receive notice before losing their property. This supposed waiver is said to come from the following circumstance. The grantor of the first security deed acquisced in all the provisions of that security deed, including the provisions of a power of sale contained in

it. That power of sale purported to waive actual notice of foreclosure. Appellants, who later accepted a second security deed on the property were, in the words of the Georgia Supreme Court quoted by appellee on page 7,

> "in privity with the grantor in the deed to secure debt."

Therefore, it is argued, they would be entitled to receive only the notice prescribed in the security deed.

In other words, the claim is not that appellants herein expressly or intentionally waived their constitutional right to receive notice before losing their property. The essence of appellee's position is that a second creditor has notice of all provisions of the first security deed, or must be charged with such notice, and therefore adopts any waivers contained therein. Since waiver of notice provisions in security deeds are commonplace (part of the "boiler plate"), appellee's argument amounts to an argument on the merits to the effect that the holder of a second security deed can be deprived of his property without notice in virtually every case.

Aside from the fragment of a sentence taken out of context from **Boddie v. Connecticut**, 401 U.S. 371 (1971), (and turned around and pointed in the opposite direction from that which this Court gave it) the appellee relies primarily upon certain lower court decisions such as **Fuentes v. Faircloth**, 317 F. Supp. 954 (S.D. Fla., 1970). This Court has of course heard oral arguments in **Fuentes** and its companion cases, **Swarb v. Lennox** and **Parham v. Cortese**, as reported in 40 L.W. 3233 (Nov. 16, 1971). It seems to us that the appellee's contentions made for a waiver in this case are even more tenuous than the comparable positions in those cases. Even if that is not so, the fact that the Court has the **Fuentes** and other cases before it argues in favor of accepting jurisdiction in the case at bar.

THE RIGHT TO RECEIVE NOTICE

There is an aspect to the case at bar which makes it stronger than many of the other cases in which this Court has held that due process requires actual notice. In a case such as **Sniadach v. Family Finance Corporation,** 395 U.S. 347, 23 L.ed. 2d 349, 89 S.Ct. 1820 (1969), the issue is not whether the party whose property is taken will **ever** receive a hearing, as is the issue in the case at bar. In **Sniadach** the Court held that wages could not be garnished off a pending suit and that to do so was a taking without due process. The defendant in **Sniadach** would have been entitled to a hearing at some time on the merits of the case and the issue decided by this Court was simply whether the defendant was entitled to a hearing before the garnishment. In the case at bar, the question is whether the holder of a subordinate security interest will ever, repeat **ever**, have a hearing. If the position of the appellee is sustained, there will not be a temporary taking of the appellants' property without notice and opportunity to be heard, with the possibility of ultimate vindication and redress. On the contrary, if the appellee's position is sustained, the appellants will have lost their property without notice and opportunity to be heard and there will never be a hearing. In **Mullane** and the subsequent cases, such as **Boddie v. Connecticut,** *supra*, the Court has pointed out that:

> "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved **and the nature of the subsequent proceedings.**" (Emphasis supplied.)
>
> **Boddie v. Connecticut,** 28 L.ed. 2d at 119.

We are dealing with a situation in which there are no subsequent proceedings.

THE NATURE OF THE NOTICE RECEIVED

A too hasty reading of appellee's brief or of the opinion of the Georgia Supreme Court might lead one to conclude that it is being said that appellants had notice of the foreclosure. We have particular reference to the excerpt from the opinion of the Supreme Court of Georgia quoted on page 7 of appellee's brief as follows:

> "This deed constituted a contract between Gaston as grantor and Stubbs as grantee, and its provisions are controlling as to the rights of the parties and their privies. Stubbs complied with its terms . . . Giordano complains that he was not notified; however, the record shows otherwise. There is nothing in the security deed, nor in the laws of Georgia, which would require Stubbs to give actual notice that he was exercising the power of sale. Giordano, being in privity with the grantor in the deed to secure debt, was entitled to no other notice than the advertisement in accordance with the provisions of the security deed."

It can be seen that the notice to the appellants that the Court is referring to is the notice by publication which was not actually seen by the appellants. Appellants did not receive notice. The matter is not in dispute, as the whole record will show. It would be pointless for the Georgia Supreme Court to discuss the proposition that the appellants were not entitled to any notice other than the notice by publication prescribed in the first security deed if it were at the same time predicating its ruling upon a finding that the appellants had actual notice.

In accordance with Rule 12, we are requesting the Clerk of the Georgia Supreme Court to certify and transmit to this Court certain portions of the record relating to the notice received by appellants. However, it is not

an issue. Counsel for appellee has never contended during the course of the litigation that appellants were given notice of the foreclosure by any means other than publication. Pending transmittal to the Court of appropriate portions of the record, we take the liberty of setting out two interrogatories by the appellants to the appellee Stubbs, and his sworn answers:

INTERROGATORY NO. 10:

"Did you give notice of the intended foreclosure to any person by any means other than the publication in the newspaper in Gwinnett County? If so, to whom did you give such notice, and by what means? On what dates did you give such notice?"

ANSWER:

"Yes, by letter of my attorney dated December 11, 1969, attached as Exhibit 'C'."

INTERROGATORY NO. 13:

"Why did you not give notice of the default to either of the plaintiffs?"

ANSWER:

"They were not the owners of the property at the time of the default."

The letter attached as Exhibit "C" was as follows:

"December 11, 1969

Mr. Donald E. Gaston
1808 Angelique Drive
Decatur, Georgia 30033

Re: Promissory Note—Donald E. Gaston
to H. F. Stubbs

Dear Mr. Gaston:

We represent H. F. Stubbs who is the holder of a Promissory Note executed by you in the principal sum of $30,000.00.

This is to advise you that said Note was due and payable in full on November 14, 1969, and Mr. Stubbs has not yet received payment. Accordingly, in the event this indebtedness is not paid within ten (10) days from receipt by you of this demand, it will be necessary for us to institute legal proceedings to recover said sum along with ten per cent (10%) thereof as Attorneys Fees, all as is provided in said Note.

Please direct any correspondence concerning this matter to the undersigned as Attorneys for Mr. Stubbs.

Yours very truly,
HUIE and HARLAND
James R. Harland, Jr.

JRHjr/mek

cc: Mr. Bob E. L. Pope"

These answers (and the letter) show that no notice of either the default or the foreclosure was given to the appellants. The letter notice of the intention to foreclose was sent to the owner, Pope, and to the original debtor, Gaston, who was by that time long since out of the picture. Appellees did not send the letter to Appellants, who would have protected their interests.

ERRATA

In the Jurisdictional Statement the citation to **Mullane v. Central Hanover Bank & Trust Company** was given incorrectly several times. It should have been 94 L.ed 865 rather than 875. On the cover the name of Bob E. L. Pope improperly appears as Hope. On page 4, second line from the bottom, the word October should read November. None of these errors affects the merits but we beg the Court's pardon.

CONCLUSION

We respectfully urge the Court to note jurisdiction of the case. We believe that this case is stronger against the application of a concept of waiver than **Fuentes** and its companion cases, but that if the Court should reverse those cases such a ruling would be dispositive of the case at bar. Even if this Court should affirm **Fuentes** we believe that there is no basis for a finding of waiver in the case at bar; no such finding was made by the lower court. Due process clearly requires that the holder of a subordinate security interest receive some kind of notice. There are no exigent circumstances in the case at bar to justify depriving appellants of the opportunity to protect their interests.

Respectfully submitted

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